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June 11, 1992

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems, PR Docket No. 92-79

Dear Ms. Searcy:

Transmitted herewith for filing on behalf of Idaho Communications Limited Partnership ("ICLP") are the original and four copies of ICLP's Comments on the above-referenced proceeding.

Also enclosed is an additional copy of this letter to be receipt-stamped and returned to the undersigned.

Should additional information be necessary in connection with this matter, kindly communicate directly with the undersigned.

Very truly yours

Raymond J. Kimball

Raymond J. Kimball

KAH/mec

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems	)	PR Docket 92-79

COMMENTS OF IDAHO COMMUNICATIONS L.P.

Idaho Communications Limited Partnership ("ICLP"), licensee of a trunked Specialized Mobile Radio ("SMR") system headquartered in Boise, Idaho, hereby respectfully submits the following comments to the Federal Communications Commission ("FCC" or "Commission") on the above-referenced Notice of Proposed Rulemaking ("NPRM").[1] As an SMR base station licensee, ICLP has a direct interest in the outcome of this proceeding.

I. Introduction

ICLP is licensee of and manages an SMR system serving over 1400 subscribers in southwestern Idaho. The area is one of rugged, mountainous terrain and narrow valleys. Over 60% of the land in Idaho is owned by the federal government, with many national parks, forest preserves, and wilderness areas. Some of ICLP's customers operate repeater facilities in connection with their operations and the potential does exist for Federal Aviation

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[1] Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems, __ FCC Rcd. ___ (released May 5, 1992).

Administration ("FAA") and National Environmental Policy Act ("NEPA") issues with respect to ICLP customers.

II. FCC Proposal

In this proceeding, the Commission has made four proposals: (1) eliminate separate end user licensing; (2) make the base station licensee responsible for ensuring end user compliance with all applicable federal regulations; (3) modify the reporting requirements associated with loading; and (4) relax the requirements for trunked SMR licensees to modify their licenses.

ICLP fully supports the Commission's loading and license modification proposals and believes these changes will reduce the regulatory burden placed on licensees while affording the Commission an effective mechanism to monitor the utilization of the frequencies assigned to the SMR service. ICLP also supports elimination of end user licensing for mobile units.[2]

The Commission's second proposal raises some serious concerns. ICLP objects to having the burdens of customer's FAA and NEPA regulatory compliance placed on SMR base station licensees. Licensing of repeaters used by customers should continue to be the responsibility of the customer. Furthermore, private radio SMR licensees should not be subjected to more burdensome regulation

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[2] Since mobile end units are type-accepted equipment, ICLP notes that there would be no issue of liability placed on base station licensees for compliance with the Commission's technical rules governing the operation of these units.

than are common carrier licensees in similar services, such as cellular telephone licensees.[3]

III. The FCC Cannot Impose Liability on SMR Licensees for the Acts of Customers

A. The FCC's Proposal is Contrary to General Rules of Licensee/Customer Liability

The Commission has proposed to allow end users to operate under a "blanket license" issued to the base station licensee. As the Commission notes, base station licensees exercise some operational control over their end users. Like cellular licensees, base station licensees do exercise control over access, interconnection and frequency use by the very nature of their operations, without having specific licensing responsibility and liability for the actions of third parties. A base station licensee can exercise operational control over the end users' channel use and access to the licensee's system. However, the FCC's proposal would make SMR base station licensees liable for the acts or omissions of their customers over which the base station licensee has no control. The proposal imposes new and onerous regulatory burdens which subject base station licensees to fines for failure to monitor FAA and NEPA compliance of antenna facilities which the licensee neither owns nor controls.

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[3] These proposed new regulatory burdens on SMR licensees would appear to be inconsistent with the President's moratorium on new federal regulations. See, "Memorandum for Certain Department and Agency Heads, Subject: Reducing the Burden of Government Regulation," dated January 28, 1992.

In the southwestern Idaho area in particular, a significant number of sites used to locate customer's repeater antennas are located on U.S. government lands. In addition to FAA and NEPA requirements, access to these areas requires a use-permit issued by the Bureau of Land Management or U.S. Forest Service. ICLP objects to any proposal that would make it liable for non-compliance by an end user with FAA, NEPA, BLM or Forest Service regulations or any other regulatory authority under whose jurisdiction the user may fall. The result would be that the new regulatory burdens would impose significant compliance costs which will fall substantially on rural licensees and small businesses.

Generally, the FCC has limited authority under the Communications Act to regulate the activities of non-licensee customers. Customers using type-accepted equipment are free to transmit any lawful messages over frequencies licensed in a particular service to others. As a result, customers of both common carriers and private carriers are not subject to direct FCC regulation (except for criminal statutes regarding harassment, fraud and obscenity which are not relevant here). For example, satellite transponder owners and lessees,[4] Multipoint Distribution Service ("MDS") customers,[5] and cellular telephone subscribers,[6] are not subject to FCC, FAA or NEPA regulation. Because customers

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[4] See, Satellite Transponder Sales Policy, 90 F.C.C.2d 1238 (1982).

[5] See, Multipoint Distribution Service, 45 F.C.C.2d 616, 618-19 (1974).

[6] See, e.g. 47 C.F.R. §22.901 et seq.

of communications service are not subject to federal regulations, carriers are not liable for the acts of their customers unless the carrier has actual knowledge of the customer's illegal acts.

The NPRM does not cite any authority in the Communications Act for the Commission's proposal to make SMR operators liable for the acts of its third-party customers. The rule of limited third party liability applicable to telephone common carriers and MDS operators should be applicable here. See, Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 2 FCC Rcd. 2819 (1987) where the Commission held that the legal test for imposing liability on common carriers for the acts of customers is "the degree of awareness or involvement" of the carrier of the illegal act. Id. at 2820. The Commission applied the general rule of telephone company limited liability to MDS operators:

> There must be a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions before any liability is likely to attach. . . We are reluctant to place MDS common carriers in the uncertain predicament of watching all programming and assessing . . . whether to engage the legal machinery for interpretative rulings.

Id. Accordingly, the "actual notice" standard is the basis for attaching liability on MDS carriers for obscene transmissions by customers. See also, Travelers Ins. Co. v. SCM Corp., 600 F.Supp. 493 (D.D.C. 1984)(tariff limiting telephone company third party liability was valid and enforceable).

The public policy of limiting liability of common carriers for acts of third-party/customers is no less applicable to private carriers. An SMR base station operator cannot be held liable for acts or omissions which he does not have actual or constructive notice. Technical and operational control over the SMR system cannot provide actual or even constructive notice of FAA or NEPA violations.

Should the Commission impose such third party obligations, SMR operators will have no alternative but to limit liability and seek indemnity from prospective customers through private contracts, just as common carriers limit their liability through tariffs. Given the potentially substantial fines imposed for FAA tower lighting and marking infractions, SMR operators will have to seek indemnity where the property in question is owned or operated by third parties.

B. The Commission Previously Considered and Rejected Proposals to Increase SMR Base Station Licensee's Responsibilities

It is significant that the Commission repeatedly has rejected proposals to transfer end user regulatory compliance to base station licensees. In 1982, the Commission rejected a proposal to eliminate end user licensing in favor of "fleet licensing" SMRs.[7] The commenters' objections to the proposal were: (1) it would improperly delegate Commission licensing and

[7] Amendment of Section 90.397 of the Commission's rules concerning mobile station, control point and control station authorization procedures for 800 MHz common user systems, 89 F.C.C.2d 638 (1982).

enforcement functions to base station operators; (2) the SMRS operator has no practical method of determining or enforcing user compliance with FCC rules; and (3) such a licensing system would unfairly subject SMRS operators to penalties for the acts of others. 89 F.C.C.2d at 641. The Commission rejected fleet licensing as too burdensome on SMR base station licensees.

The only instance in which the Commission has suggested that it might have the authority to impose third party liability is in the case of shared SMR systems.[8] However, by definition, in "shared systems" all parties exercise control over the communications facilities. This suggestion does not offer any support for the proposition that base station licensees, who do not exercise control over end user facilities, should be responsible for the end user's compliance with "all applicable regulations."

In 1986, the Commission again rejected a similar proposal. Referring to its earlier 1982 decision, the Commission stated:

> Under fleet licensing . . . the SMR base station licensee would be responsible for ensuring that all end users observed applicable technical standards when operating their mobile units and control stations. The added responsibility imposed on the SMR base station licensee was one of the primary reasons we declined to adopt fleet licensing. This concern remains valid.

Amendment of Part 90 of the Commission's Rules to Modify Application Requirements for End Users of SMR Systems, 104 F.C.C.2d 902, 906 (1986)(emphasis added).

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[8] Id., 89 F.C.C.2d at 644.

Finally, in 1990, the Commission again rejected the elimination of SMR end user licensing, finding that the end user licensing process is "designed to assure compliance with statutory requirements . . . such as [FAA and NEPA] . . . To this end, there is no viable alternative before us . . . ". Amendment of Part 90 of the Commission's Rules to Modify Application Requirements for End Users of SMR Systems, 5 FCC Rcd. 2975 (1990). As recently as 1990, the suggestion that base station licensees become responsible for policing end users for regulatory compliance with FAA and NEPA was not a "viable alternative."

Nothing has changed with respect to industry practices, SMR technology or utilization of this service that justifies reversing the position the Commission has taken on this issue since 1982. Because base station licensees cannot exercise operational control over end user antenna facilities and therefore would have no actual or constructive notice of whether that user has complied with FAA, NEPA or other regulatory requirements, base station licensees cannot be burdened with liability for non-compliance.

IV. ICLP Proposal

The Commission has recognized that less than one percent (1%) of end user facilities require either FAA or NEPA clearance.[9] ICLP suggests that the Commission continue to require the one percent of end users with antenna facilities to obtain any required clearances and comply with any applicable regulations with respect

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[9] NPRM, at n. 14.

to such facilities. The other 99% of mobile end users do not need to be licensed, as long as their equipment is type accepted. This approach would be similar to cellular end user requirements currently in force.

IV. Conclusion

ICLP supports the Commission's proposal to amend Part 90 of the Commission's rules to eliminate separate end user licensing for the 99% of SMR end users that use type-accepted equipment and do not utilize antenna facilities which could trigger FAA or NEPA requirements. The remaining one percent of users that are currently responsible for obtaining FAA or NEPA clearances should be required to continue to license their facilities under current regulations.

Respectfully submitted,

IDAHO COMMUNICATIONS, L.P.

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